United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1329

B
P/5

United States Court of Appeals

For the Second Circuit

ISLAND CREEK COAL SALES COMPANY,

Plaintiff-Appellant,

v.

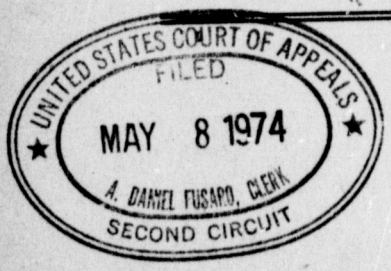
INDIANA-KENTUCKY ELECTRIC CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

---

BRIEF FOR PLAINTIFF-APPELLANT



PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:
SIMON ROSE
JANET P. KANE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

For the Second Circuit

Docket No. 74-1329

ISLAND CREEK COAL SALES COMPANY,

Plaintiff-Appellant,

v.

INDIANA-KENTUCKY ELECTRIC CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

---

BRIEF FOR PLAINTIFF-APPELLANT

Issue Presented

The single issue for review is whether termination by plaintiff of an agreement in accordance with the provision of that agreement authorizing plaintiff to terminate in the exercise of its "sole judgment" is subject to arbitration.

Statement of the Case

This is an appeal by plaintiff Island Creek Coal Sales Company ("Island Creek") from a judgment of the United States District Court for the Southern District of New York filed on December 10, 1973 (102a)* dismissing the complaint. Judgment was entered pursuant to the order of Judge Arnold Bauman filed on November 21, 1973 (90a *et seq.*) which granted a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure made by defendant Indiana-Kentucky Electric Corporation ("IKEC") (98a).

Island Creek brought the action primarily for a declaratory judgment that its decision to terminate a coal supply agreement with IKEC pursuant to Article IV, §6 of that agreement was, by the express terms of the agreement, a matter within its "sole judgment" and exempted from arbitration (9a). The District Court held that, regardless of the scope of the underlying arbitration clause, Island Creek, in a submission dated June 10, 1971 (14a-17a)—a submission made some 13 months prior to termination of the coal supply agreement (10a49)—"submitted to arbitration its right to terminate under Article IV, §6 and, having done so, cannot now seek to withdraw from it" (94a).

The Relevant Facts

A. The Coal Supply Agreement

On December 19, 1966, Island Creek, a Maine corporation, entered into an agreement (10a-10a48) with IKEC, an Indiana corporation, pursuant to which Island Creek was

* Numbers followed by "a" in parentheses refer to pages in the Appendix.

to supply coal to IKEC from Island Creek's Hamilton No. 1 Mine in Western Kentucky for the period 1968 through 1982. Article IV, §6 of the agreement (10a14) provides in relevant part:

> "The parties hereto also recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result thereof *Seller in its sole judgment* decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and *if in Seller's sole judgment* such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions, Seller shall have the right, upon notice to Buyer, to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that *Seller, in its sole judgment* deems such expense to be unreasonable." (Emphasis added)

The same Article IV, §6, also gives IKEC a similar right to terminate the agreement for matters within *its* sole judgment (10a13).

Article VI, §12 of the agreement (10a39) is the arbitration clause. The parties there agreed:

> "*Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto,* any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction." (Emphasis added)

In the entire agreement, which contains 43 pages of text, only the matters set forth in Article IV, §6 (10a12-10a13) are matters "stated . . . to be within the sole judgment of one of the parties . . ." (93a-94a).

B. The Joint Submission of June 10, 1971

No problem arose with respect to deliveries of coal in the years 1968-1969. On November 20, 1968, however, 70 coal miners died in a disaster at Consolidation Coal Company's No. 9 Mine located near Farmington, Virginia. Congress responded to this disaster by enacting the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 *et seq.* ("the Safety Act"), which became effective on March 30, 1970. In 1970 and 1971, because of the effects of the Safety Act (65a-89a, *passim*), Island Creek was unable to furnish IKEC with the quantity of coal called for by the agreement. On June 10, 1971 a joint submission to arbitration (14a-17a) was filed with the American Arbitration Association in which IKEC claimed damages for short

deliveries in 1970 and prospectively in 1971. A copy of the coal supply agreement was annexed to the joint submission (14a), and the arbitration clause of the agreement, which excepted from arbitration any matter expressly stated "to be within the sole judgment of one of the parties" (*i.e.*, the matters specified in Article IV, §6) was set forth in full in the body of the submission. No new or different agreement to arbitrate was contemplated (18a).

The original draft of the submission was prepared by IKEC (52a) and was concerned exclusively with the damage it had allegedly incurred as a result of the short deliveries (52a-53a). Although the draft attempted to set forth the grounds upon which Island Creek claimed it was excused delivery (54a), Island Creek considered the statement inadequate. Accordingly, it revised the draft by adding, among other things, recitals that as a result of the Safety Act it was compelled to prorate among its customers the coal produced at the Hamilton No. 1 Mine (14a-15a, 52a-53a) and that it was entitled to terminate its contract under Article IV, §6 (*Ibid.*). It also raised the *force majeure* clause of the agreement and Article 2-615 of the UCC by way of defense (15a) and, on the ground of hardship, requested equitable adjustment or termination (*Ibid.*). At this time, Island Creek had not even met with IKEC to consider corrective steps (19a), a prerequisite to termination under Article IV, §6 (10a13), much less served the required notice of termination (19a). The inclusion in the submission of a reference to Article IV, §6 was intended by Island Creek to indicate to the arbitrators that the risk of governmental regulation had been allocated to IKEC (19a).

C. IKEC's Unilateral Submission of January 25, 1973

Subsequent to the filing of the joint submission, Island Creek advised IKEC that, because of the Safety Act, it was impossible or impractical to continue to produce and deliver coal and, on December 1, 1971, almost six months after the filing of the joint submission to arbitration, a meeting was held to consider what corrective steps could be taken (19a-20a). The parties were unable to agree and, by letter dated July 20, 1972 (10a49), Island Creek gave IKEC notice terminating the coal supply agreement pursuant to Article IV, §6. Thereafter, by letter dated January 25, 1973 (13a), IKEC attempted to enlarge the scope of the arbitration by unilaterally submitting to the arbitrators the issue of such termination.* IKEC's letter reads in pertinent part as follows:

> "*Since the foregoing arbitration was initiated,* Island Creek Coal Sales Company (Seller) has terminated the contract with respect to which this arbitration was initiated, purporting to act under the provisions of Section 6 of Article IV of said contract. . . .
>
> "It is the position of the Buyer, Indiana-Kentucky Electric Corporation, that the determination of Seller that it would be impossible or impractical to continue to produce coal for delivery under the contract was not made as a result of the imposition of regulations or restrictions referred to in Section 6 of Article IV of said contract and Indiana-Kentucky Electric Corporation *desires to submit for arbitration* and question whether such determination was made as a result of the imposition of regulations of the type referred to . . . ." (Emphasis added)

Island Creek then instituted the present declaratory judgment action.

---

* Significantly, no mention whatsoever of this letter is to be found in the opinion of the District Court.

The Decision Below

Judge Bauman rested his decision entirely upon the recital relating to Island Creek's right to terminate under Article IV, §6 contained in the joint submission (95a). He gave no weight to the inclusion in the very same submission of *the arbitration clause pursuant to which the submission was made* (16a)—a clause which by its terms necessarily excluded termination under Article IV, §6. Nor did he recognize that the joint submission (unlike the underlying arbitration clause) was not an agreement to arbitrate future controversies, but the submission to arbitration of *existing* disputes. Plainly, there was no existing dispute with respect to Island Creek's right to terminate the agreement pursuant to Article IV, §6 because Island Creek had not even attempted to terminate the agreement pursuant to that article at that time. Moreover, he wholly disregarded the subsequent events, namely, Island Creek's actual termination pursuant to Article IV, §6 and, most notably, IKEC's attempt to *add* it as an issue in the pending arbitration, which confirm the clear understanding of the parties themselves that such termination was not a matter covered in the joint submission. Consideration of these facts, we submit, compels the conclusion that the decision below was erroneous.

POINT I

Absent an agreement to do so, one cannot be required to arbitrate a dispute.

Arbitration is a matter of contract. There is no right to arbitrate a dispute and one cannot be denied access to the courts unless he agrees to waive his right to take his controversy to court. Thus, the Supreme Court wrote in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962):

> "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Or, as this Court has phrased the rule, "It is, of course, true . . . that no one can be compelled to arbitrate a dispute if he has not agreed to do so." *International Longshoremen's Ass'n* v. *New York Shipping Ass'n*, 403 F.2d 807, 809 (2d Cir. 1968).

Consequently, "The mere fact that parties have agreed to arbitrate controversies of a certain class or type obviously does not require them to arbitrate disputes in an entirely different category arising under different documents." *Universal American Corporation* v. *S.S. Hoegh Drake*, 264 F. Supp. 747, 751 (S.D.N.Y. 1966). To the contrary, whether a party has agreed to arbitrate a particular dispute depends upon the language of the agreement and its interpretation. *International Union, etc.* v. *Benton Harbor Malleable Industries*, 242 F.2d 536, 539 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957).

Further, "It is settled under . . . Federal . . . law that the court must decide whether a party is bound to

arbitrate and what issues he must arbitrate." *Hussey Metal Division* v. *Lectromelt Furnace Division,* 471 F.2d 556, 557 (3d Cir. 1973). The Supreme Court, citing *Atkinson* v. *Sinclair Refining Co., supra* at 241, reaffirmed its adherence to this principle in *Wiley & Sons* v. *Livingston,* 376 U.S. 543, 546 (1964):

> " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' "

Accordingly, it is the court and not the arbitrators who must decide whether Island Creek's termination of the coal supply agreement pursuant to Article IV, §6 is a matter which Island Creek agreed to arbitrate. As we shall demonstrate in Point II of this brief, Island Creek did not so agree. It follows that the matter is not arbitrable.

POINT II

Island Creek has never agreed to arbitrate its right to terminate pursuant to Article IV, §6.

A. Article IV, §6 is expressly excluded from the arbitration provision of the coal supply agreement.

Article VI, §12, of the coal supply agreement provides that any dispute, controversy or claim arising out of or relating to the agreement shall be determined by arbitration *except as to any matter expressly stated to be within the sole judgment of one of the parties.* Since Article IV, §6 is the *only* article in the entire agreement which leaves mat-

ters to the sole judgment of the parties, it is obvious that the exclusionary words were specially designed for that article. Thus, these matters were specifically excluded from arbitration.

This Court has held that a clear and unambiguous exclusion such as that which is found in Article VI, §12 must be given legal effect. *Communications Workers of America* v. *New York Telephone Co.*, 327 F.2d 94 (2d Cir. 1964); *cf., Strauss* v. *Silvercup Bakers, Inc.*, 353 F.2d 555 (2d Cir. 1965). "Where [as here] the contract is not susceptible of a construction that the parties had agreed to arbitrate the dispute in question, arbitration will not be ordered." *Local Union No. 4* v. *Radio Thirteen-Eighty, Inc.*, 469 F.2d 610, 614 (8th Cir. 1972). As the Court of Appeals noted in *International Union, U.A.A. & A.I.W.* v. *General Electric Company*, 474 F.2d 1172, 1176 (6th Cir. 1973):

> "It thus appears that the arbitration clause in the 1963-66 contract was written with great particularity as to what was and what was not subject to arbitration. As the District Judge noted, the strong preference in the federal law favoring arbitration does not allow the courts to order arbitration of an issue which the parties have not agreed to arbitrate. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1963); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1961); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); District 50, UMW v. Chris-Craft Corp., 385 F.2d 946 (6th Cir. 1967)."

Article IV, §6 itself leaves no matters open for determination by arbitration. Any matters which might otherwise have been the subject of dispute are expressly left to the sole judgment of Island Creek. The article envisages:

1. The imposition of regulations or restrictions relating to mining practices by legislative or regulatory bodies or the courts;

2. A decision by Island Creek *in its sole judgment* that it is impossible or impractical to continue to produce coal for delivery under the agreement;

3. Notice to IKEC of that decision for consideration of corrective steps;

4. Determination by Island Creek *in its sole judgment* that corrective steps will not, without unreasonable expense to Island Creek, make it possible for Island Creek to continue to perform without violating the regulations or restrictions;

5. Notice by Island Creek to IKEC terminating the agreement;

6. IKEC's right to prevent termination by agreeing to reimburse Island Creek for the expenses deemed by Island Creek *in its sole judgment* to be unreasonable.

It is beyond dispute that, after execution of the agreement, regulations and restrictions relating to mining practices were imposed as a result of the enactment of the Safety Act. Section 801(g) of the Act (30 U.S.C. §801(g)) states:

> "it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's

coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards . . . ."

Sections 842 through 846 (30 U.S.C. §§842-46) prescribe interim mandatory health standards and Sections 862 through 878 (30 U.S.C. §§862-78) interim mandatory safety standards applicable to all underground coal mines until superseded by improved standards promulgated by the Secretary of the Interior.

The record establishes that Island Creek notified IKEC that, because of the regulations and restrictions imposed by the Safety Act, it was impossible or impractical for Island Creek to continue to produce coal for delivery to IKEC; that corrective steps were considered; and that Island Creek gave notice to IKEC terminating the agreement by reason of the fact that, in Island Creek's judgment, the corrective steps would not, without unreasonable expense to Island Creek, make it possible for Island Creek to continue to perform without violating the regulations or restrictions. IKEC does not claim that it asserted its right under the agreement to avoid termination by agreeing to reimburse Island Creek for expenses which Island Creek deemed to be unreasonable.

Thus, Island Creek perfected its right to terminate the agreement based upon decisions which Article IV, §6 expressly left to Island Creek's sole judgment, and there is nothing to arbitrate. Nor, we would point out, is there anything inequitable in Island Creek's position. The first paragraph of Article IV, §6 gives *IKEC* a right to terminate the agreement in the event that regulations or restrictions relating to air pollution make it impossible or impractical for IKEC to utilize the coal, and the identical

matters that are left to Island Creek's sole judgment are left to *IKEC's sole judgment* in exercising *its* right to terminate.

B. The submission of June 10, 1971, did not enlarge the scope of Article VI, §6, the arbitration provision.

The joint submission of June 10, 1971, was a submission to arbitration of an existing dispute. It was not, and it did not purport to be, an agreement to arbitrate future disputes. Moreover, it was made pursuant to, it did not supersede, Article VI, §12, the arbitration provision contained in the agreement between Island Creek and IKEC.

On June 10, 1971, Island Creek's right to short ship IKEC for 1970 and 1971 was the only dispute which existed between the parties and thus the only dispute which was or could have been submitted to arbitration. Not until over a year later did Island Creek give notice terminating the agreement pursuant to Article IV, §6. Only then could or did a dispute arise concerning Island Creek's decision to terminate pursuant to that article. *IKEC's* unilateral attempt on January 25, 1973 to *add* this dispute to the pending arbitration is further evidence, if any were needed, that the issue was *not* submitted in June of 1971.

Judge Bauman apparently overlooked the actual chronology of events in reaching the opposite conclusion. *Amicicizia Societa Navegazione* v. *Chilean Nitrate & Jodine Sales Corp.*, 274 F.2d 805 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960) (as well as the other cases cited in the opinion below, all of which are either cited in or follow *Amicicizia*), are clearly inapplicable to the facts of the instant case. *Amicicizia* stands for the proposition that submission to arbitration of an existing dispute which is arguably outside the

scope of the original arbitration clause evinces a subsequent agreement to arbitrate *that dispute*. The proposition obviously does not apply where, as here, at the time of the submission the dispute whose arbitrability is in question did not even exist.

The decision in *Amicicizia* is in accord with the language of Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, which renders "valid, irrevocable and enforceable *either* "A written *provision in . . . a contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising* out of such contract . . . *or* an agreement in writing to *submit* to arbitration *an existing controversy* . . ." (Emphasis added). Thus, like the applicable case law, the statute does not bind a party, apart from contract, to arbitrate a *future* dispute. Here, clearly, the contractual provision does not cover the instant dispute; indeed, the provision specifically excludes this dispute from the scope of arbitration.

Conclusion

Since Island Creek has never agreed to arbitrate matters which the parties agreed were within Island Creek's sole judgment, Island Creek respectfully requests this Court to reverse the judgment of the District Court and adjudge and declare that Island Creek's decision to terminate the agreement pursuant to Article IV, §6 is not arbitrable.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff-Appellant

Of Counsel:
SIMON ROSE
JANET P. KANE